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No. 02-728

In The

# Supreme Court of the United States

BRANDON VALDIVIESO and DAVID KICKZALES, on behalf of themselves and all others similarly situated,

*Petitioners,*

*vs.*

ATLAS AIR, INC.,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

**The Eleventh Circuit's interpretation of the FLSA's jurisdictional provisions raises an important question of federal jurisdiction by eliminating the choice of forum that Congress gave to wage-and-hour plaintiffs.**

The reading that respondent and the court of appeals give to the jurisdictional provisions of the Fair

Labor Standards Act of 1938[1] — by simply ignoring the statute's provision that any action brought pursuant to it "may be maintained ... in any Federal or State court of competent jurisdiction" — adversely impacts literally thousands of cases each year, *i.e.*, all of those brought under the FLSA and four similar labor-and-employment statutes.[2] By denying the plaintiff his choice of forum, the court of appeals' approach "radically expand[s] the class of removable cases." *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, ___, 122 S. Ct. 1889, 1894 (2002) (federal-law counterclaim cannot be the basis for removal jurisdiction). Such an approach flies in the face of both Congress' expression of intent and this Court's strict construction of statutes concerning the expansion of federal jurisdiction.

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

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[1] 29 U.S.C. § 201, *et seq.*

[2] The Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, adopts the enforcement mechanism of the FLSA, *see* 29 U.S.C. § 626(b), and the Equal Pay Act, 29 U.S.C. § 206(d)is codified and the as part of the FLSA. The Employee Polygraph Protection Act, 29 U.S.C. § 2001, *et seq.*, and the Family Medical Leave Act, 29 U.S.C. 2601, *et seq.*, each states, as does the FLSA, that an action pursuant to those statutes "may be maintained ... in any Federal or State court of competent jurisdiction." *See* 29 U.S.C. §§ 216(b) (FLSA), 2005(c)(2) (EPPA) and 2617(a)(2) (FMLA).

*Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 377 (1994) (citations omitted). "[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941).

Respondent contends that Congress superceded *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947) with the 1948 amendment to the removal statute that permitted removal of any federal-question case "[e]xcept as otherwise expressly provided..."[3] 28 U.S.C. § 1441(a). *Johnson*, however, essentially holds that the "may be maintained" language is an express prohibition. *Johnson* reflected the majority rule at the time, based on the 19 district court cases it cited as denying removability compared to the nine it cited as permitting it. 162 F.2d at 89, n. 3. Although the *Johnson* court mildly criticized the language that Congress had chosen, it found that there was no doubt that the phrase "may be maintained" could mean anything other than that FLSA cases could not be removed.[4] 162 F.2d at 89. Otherwise, the *Johnson* court

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[3]The arguments of respondent, Atlas Air., Inc., largely mirror those of the respondent in *Breuer v. Jim's Concrete of Brevard Co., Inc.*, No. 02-337, which involves the same issues as in Question Presented No. 1 in the case at bar. The petitioner in *Breuer* does not appear from the electronic docket to have filed a reply brief. Petitioners, therefore, here address the issues raised in both briefs in opposition.

[4]While various dictionaries contain various meanings of "maintain," — *see* Brief in Opposition, at 7 (two definitions); Brief in Opposition in *Breuer*, at 5-6 (six definitions) — none of those definitions is inconsistent with keeping a state-court FLSA action in state court; all, however, are inconsistent with a removal process that allows defendants to pull wage-and-hour suits out of state court immediately upon their being filed — and requires that they do so, if

(continued...)

reasoned, "may be maintained" would be surplusage — which, as a matter of statutory construction, would be impermissible.[5] Likewise impermissible is the other construction that respondent urges without specifically saying so: that the 1948 amendment to § 1441(a) repealed the jurisdictional provision of the FLSA by implication.[6]

The conclusion that "may be maintained" means "cannot be removed" is further propelled by an analysis of the various statutes that are specified at 28 U.S.C. § 1445 ("Nonremovable actions"). None of them contain any language similar to the FLSA; each of them, therefore, requires the express prohibition of § 1445. Additionally, a 1958 Senate committee report listed the FLSA as being among those actions that always had been intended to be non-removable.[7]

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[4](...continued)
they plan to, within 30 days. *See* 28 U.S.C. § 1446(b).

[5]*See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

[6]*See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808-809 (1976).

[7]The report stated that Congress always had intended FLSA actions brought in state courts to be non-removable.

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmens' compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employer's Liability Act, all of which are in the nature of workmens' compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. *If filed in the State courts the law prohibits removal to the Federal Court.*

S. Rep. No. 1830, 85th Cong., 2d Sess. 9 (1958), *reprinted in* 1958
(continued...)

Although respondent attempts to portray the conflict between the circuits as a stale one, and *Johnson* as having been superceded 54 years ago, that is incorrect.[8] *Johnson* has been followed by a district court in the Fifth Circuit as recently as July 2002,[9] was followed by district courts in Florida in 1997 and 2000[10] prior to *Breuer v.*

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[7](...continued)
U.S.C.C.A.N. 3099, 3106 (emphasis added).

While subsequent legislative history is not dispositive, it is useful in illumining congressional intent. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, (1982) (citing such history as additional support for the conclusion that Congress intended the 180 days within which a Title VII claimant must file a Charge of Discrimination with the Equal Employment Opportunity Commission to operate as a statute of limitations instead of a jurisdictional requirement).

[8]Respondent cites to two Eighth Circuit district-court decisions that did not follow *Johnson* as illustrating that it no longer is good law there. While the court in *Niswander v. Paul Hardeman, Inc.*, 223 F.Supp. 74 (E.D. Ark. 1963) did reason that the 1948 amendment to § 1441(a) made *Johnson* no long applicable, the seven-sentence discussion of the motion to remand in *Waldermeyer v. ITT Consumer Financial Corp.*, 767 F. Supp. 989, 991 (E.D. Mo. 1991) quotes § 1441(a) but neither discusses nor distinguishes *Johnson*. That same year, however, another district court in Missouri held that *Johnson* was still binding in the Eighth Circuit. *Courtwright v. The Board of Regents of Central Missouri State University*, Slip Copy No. 91-0846-CV-W-3, 1991 U.S. Dist. LEXIS 17238, 1991 WL 255594 (W.D.Mo. Nov. 22, 1991).

[9]*See Castillo v. Texans Can!*, Slip Copy, No. CIV.A.3:02-CV-0587-R, 2002 U.S.Dist. LEXIS 13555, 2002 WL 1733727 (N.D. Tex. July 25, 2002)

[10]*See Maranto v. Jenne*, Slip Copy No. 00-7463-Civ-Dimitrouleas (S.D. Fla. Nov. 29, 2000 ) (remanding Equal Pay Act claim on authority of *Johnson*); *LeMay v. Budget Rent A Car*
(continued...)

*Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3159 (U.S. Sept. 3, 2002) (No. 02-337), and in 1997 by a district court in the Eighth Circuit that characterized it as still binding.[11] Another district court in Texas earlier this year relied on *Johnson* to hold that a claim brought pursuant to the FMLA could not be removed.[12] The controversy, thus, is not stale: it is still brewing and remains unresolved in all but three circuits — two for removability and one against.[13] Worse yet, the conflict is likely to remain unresolved at the circuit level because of the impossibility of appealing remand orders, *see* 28 U.S.C. § 1447(d), and the logistical difficulties of appealing interlocutory orders denying remand. Thousands of litigants each year, who might otherwise file their wage-and-hour, equal-pay, age-discrimination, family-and-medical-leave and polygraph-abuse claims in state court will find themselves deprived of a choice of forum — contrary both to the intention of Congress and to the "long-standing polic[y]" that makes a plaintiff the "master

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[10](...continued)
*Systems, Inc.*, 993 F.Supp. 1448, 1450, n. 3 (M.D. Fla. 1997) (remanding ADEA claim on strength of *Johnson*.

[11]*Pauly v. Eagle Point Software Co.*, 958 F. Supp. 437, 439 (N.D. Ia. 1997) ("Given the split of authority, this Court cannot conclude that there has been a clear and unequivocal statutory override of the *Johnson* case which would allow the undersigned to disregard clear precedent from the Eighth Circuit Court of Appeals.")

[12]*See Lloyd v. Classic Chevrolet, Inc.*, Slip Copy No. CIV 4:01-CV-896-Y, 2002 U.S. Dist. LEXIS 1604, 2002 WL 989470 (N.D. Tex. Jan. 31, 2002) (granting motion to remand claim brought pursuant to FMLA because of the *Johnson* interpretation of "may be maintained").

[13]*Compare Johnson* (against removal) and *Breuer* and *Cosme Nieves v. Deshler*, 786 F.2d 445, 451. (1st Cir.), *cert denied*, 479 U.S. 824 (1986) (for removal).

of his complaint." *Holmes Group, Inc.*, 535 U.S. at ___, 122 S. Ct. at 1894.

The importance of this issue, as well as the currency of the controversy, requires resolution through a grant of certiorari.

**Respondent's authorities demonstrate that the various overtime exemptions for carriers (motor carriers, shipping lines and air carriers) were intended to prevent double-regulation — and not to permit those industries to operate with no regulation of maximum hours.**

While respondent asserts that "the transportation exemptions to which Petitioners analogize the air carrier exemption demonstrates that those exemption, including the exemption for air carriers, were never intended to apply only to employees whose hours are otherwise regulated,"[14] the authorities upon which respondent relies show clearly that precisely the opposite is true. Indeed, the Court in *Levenson v. Spector Motor Service*, 330 U.S. 649 (1947), one of the two cases that respondent cites for this proposition, explained the rationale for imposing maximum-hour limitations in the context of "[t]he history of the development of the congressional safety program in interstate commerce, up to and including the enactment of the Motor Carrier Act in 1935 and the Fair Labor Standards Act in 1938...." 330 U.S. at 657. The *Levenson* Court found that as part of "[the] logic of the situation," Congress had "prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service." *Id.* at 661. Thus, any expansion of the

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[14]Brief in Opposition, at 15.

maximum-hour authority of one necessarily results in a contraction, "to a corresponding degree," of the power of the other. *Id.* at 659, 684. In *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943), the other case upon which respondent relies, the Court eschewed "the literal reading of the exception section of the Fair Labor Standards Act..." that respondent urges. Instead, the Court noted the necessity of construing the FLSA and the Motor Carrier Act together "in the light of the purposes which led to the enactment of the entire legislation." 319 U.S. at 47. The Court, looking at the FLSA's legislative history, observed that — as Petitioners argue — "[t]he amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers." *Id.* at 48-49. Although respondent urges the Court to disregard the remarks of the primary sponsor of the FLSA, Senator (and later Justice) Hugo Black, the *Southland* Court (of which Justice Black was a member) stated as part of its rationale that "[f]urthermore, it was said on the Senate floor that the amendment as to motor vehicle operators was to give them the exemption from the Fair Labor Standards Act enjoyed by the railway employers under the Hours of Service Acts." *Id.* at 49.

Respondent points to no source of maximum-hour regulation for any air carrier employees other than pilots, nor even of any unexercised authority for such regulation. It argues, instead that Congress intended all segments of the air carrier industry to operate with no such regulation. While respondent does cite a number of district court and trial court cases that have interpreted the air-carrier exemption expansively,[15] none of those cases either examined the legislative history of the amendment creating the exemption or analyzed it as this Court did in, *inter alia, Levinson* and *Southland Gasoline Co.* Thus,

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[15]Brief in Opposition, at 11-12.

respondent's authorities demonstrate, if anything, the importance of this Court's granting certiorari on this question and conforming the interpretation of the air-carrier exemption to this Court's earlier interpretation of the motor-carrier exemption.

Respectfully submitted,

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